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OCTOBER TERM, 1975

No. 75-6841

PACIFIC MARITIME ASSOCIATION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and its LOCALS 13, 63, 10 and 34, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR WRIT OF CERTIORARI to Review a Decision of the Court of Appeals for the District of Columbia

KENNETH W. ANDERSON,
KENNETH E. RISTAU, JR.,
515 South Flower Street,
Los Angeles, California 90071,
Telephone: (213) 488-7344,
Attorneys for Petitioner Pacific Maritime Association.

NORMAN LEONARD,
1182 Market Street,
San Francisco, California 94102,
Telephone: (415) 626-3077,
Attorney for Petitioners International Longshoremen's and Warehousemen's Union and Locals 13, 63, 10 and 34.

GIBSON, DUNN & CRUTCHER,
515 South Flower Street,
Los Angeles, California 90071,
Telephone: (213) 488-7344,
GLADSTEIN, LEONARD,
PATSEY AND ANDERSEN,
1182 Market Street,
San Francisco, California 94102,
Telephone: (415) 626-3077,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI to Review a Decision of the Court of Appeals for the District of Columbia

Petitioners, Pacific Maritime Association (PMA) and International Longshoremen's and Warehousemen's Union and its Locals 13, 63, 10 and 34 (ILWU), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this proceeding on June 26, 1975.

OPINIONS BELOW

The Court of Appeals rendered no opinion herein but, for the reasons stated in the Decision and Order

of the National Labor Relations Board (Board) reported at 208 NLRB No. 130, enforced the Board's Order (see *Pacific Maritime Association v. NLRB,* 515 F.2d 1018). A copy of the Court's judgment is appended to this petition as Appendix A and a copy of the Board's Decision and Order is appended to this petition as Appendix B (App.).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on June 26, 1975. Timely petitions for rehearing were denied on August 11, 1975, and this petition for certiorari is being filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Board has construed Section 8(e) of the Labor Management Relations Act of 1947 as amended, 29 USC 158(e) (the Act) to prohibit the execution of, and Section 8(b)(4)(i) and (ii)(B), 29 USC 158(b)(4)(i) and (ii)(B) to prohibit peaceful efforts by a labor organization to implement, a collective bargaining contract the object of which is to protect employees against the effect of technologically created job erosion because of the alleged effect of the contract upon third persons. In so construing these sections of the Act, the Board failed to consider that the work sought to be protected by the contract, the stuffing and un-

stuffing of modern containers, is fairly claimable by members of the collective bargaining unit as a substitute for work which they had historically and traditionally performed. The Court of Appeals enforced the Board Order without opinion. The questions presented are:

1. Whether this construction of Section 8(e) is contrary to the holding and rationale of *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612 (1967) and *Houston Insulation Contractors Association v. NLRB,* 386 U.S. 664 (1967).

2. Whether the failure to consider that the work at issue is fairly claimable as a substitute for work historically performed is contrary to the rationale of the foregoing decisions of this Court and is contrary to the holdings of the Courts of Appeals for the Second, Third, Sixth and Eighth Circuits in *NLRB v. Local Union No. 28, Sheet Metal Workers International Association,* 380 F.2d 827 (2 Cir., 1967); *NLRB v. Local Union No. 164, International Brotherhood of Electrical Workers,* 388 F.2d 105 (3 Cir., 1968); *Canada Dry Corporation v. NLRB,* 421 F.2d 907 (6 Cir., 1970); *American Boiler Manufacturers' Association v. NLRB,* 404 F.2d 547 (8 Cir., 1968), *cert. den.* 398 U.S. 960 (1970), respectively.

STATUTORY PROVISIONS INVOLVED

This case involves the provisions of Section 8(e) and Section 8(b)(4)(i) and (ii)(B) of the Act. Those sections read in relevant part:

8(e):

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

8(b)(4)(i) and (ii)(B):

It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person . . .

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

STATEMENT OF THE CASE

1. Introduction.

Petitioner PMA is a multi-employer, coastwide association of shipping, stevedoring and terminal companies which performs for twenty-four West Coast ports the function of handling all the labor relations matters of its members. Petitioner ILWU is the labor organization which represents West Coast longshoremen and was certified almost forty years ago as the statutory bargaining representative of "the workers who do the longshore work in the Pacific Coast ports of the United States . . ." *(Shipowners Association of the Pacific,* 7 NLRB 1002 [1938]).

This "longshore work in the Pacific Coast ports of the United States" is not an inconsiderable item in the national economic picture. Thus, as of June 1975 there were over 12,000 persons employed as longshoremen by approximately 114 companies on the Pacific Coast of the United States. In the year 1974 they handled almost 75,000,000 tons of cargo worth almost twenty-four billions dollars across West Coast docks, and earned aggregate wages of almost $215,000,000.

This case involves a Decision and Order of the Board, affirmed without opinion by the Court of Appeals, which struck down provisions of collective bargaining agreements known as the Container Freight Station Supplements (CFSS), reached between PMA and ILWU. These provisions were designed to soften, in some measure, the adverse economic impact on longshoremen of a recently developed cargo handling technique known as containerization.

Containerization is essentially the utilization of large specially constructed boxes into which cargo is "stuffed" (loaded) and which are then placed aboard ship for ocean transport and from which cargo is "unstuffed" (unloaded) at the completion of the voyage. Ships have been specially built to accommodate containers; special equipment (container cranes) has been designed and put into use and special facilities (container yards and container freight stations) have been established to accommodate the new technology.[1]

As a result of these new technological developments the preliminary work of assembling cargo before it is loaded aboard a vessel which formerly was done by longshoremen at the dock (or its disassembly there after it was unloaded from the ship) has been substantially reduced and much of it is now being performed by non-unit employees at places away from the docks.

Generally speaking, the collective bargaining agreements here at issue provide that the stuffing and unstuffing of containers carried aboard vessels owned or stevedored by members of petitioner PMA shall be

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[1]These new technical developments in cargo handling have posed problems not only in the law of labor relations, but in other areas of the law as well. (*Royal Typewriter Co. etc. v. M/V Kulmerland,* 483 F.2d 645, 649 [2 Cir. 1973] ["Until the adding machine cartons were packed in the container . . . they were not suitable for ocean transportation or handling"]; *Standard Electric v. Hamburg S.D.G.*, 375 F.2d 943, 945 [2 Cir. 1967] [". . . [f]ew . . . could have foreseen the change in the optimum size of shipping units that has arisen as a result of the technological advances in the shipping industry"]; Sen.Rep. 92-1125, 92d Cong., 2d Sess. [September 14, 1972] p. 13 [". . . with the advent of modern cargo handling techniques, such as containerization. . . . more of the longshoremen's work is performed on land than heretofore"].)

performed at the docks by employees represented by petitioner ILWU. There are substantial exceptions to this contract coverage (shippers loads and cargo in the door-to-door trade) with the net result that even if these contracts were permitted to be carried out they would affect only about 15 percent of the containerized cargo on the West Coast. But it is precisely this 15 percent which represents the jobs which the longshoremen have directly lost in recent years.

The Board found that "technological advances had seriously diminished available work for longshoremen" (App. vi);[2] that "the ILWU was concerned at the loss of longshore work . . . and therefore sought and obtained from PMA the so-called Container Freight Station Supplements . . ." (App. viii); and that "the loss of work on the docks, whether due to the use of large containers or other technological improvements, is certainly a matter of legitimate concern to the ILWU" (App. x). Nonetheless, the Board held that the CFSS violated Section 8(e) of the Act and that ILWU's peaceful attempts to implement it violated Section 8(b)(i) and (ii)(B) because PMA and ILWU had, in attempting to resolve these work loss problems "affect[ed] the rights of other employers and their employees" (App. xii). This holding, given the findings that the ILWU was legitimately concerned about the serious diminution of work caused by containerization and *therefore* sought and

[2]Earlier, the Second Circuit had recognized this fact: "The result of this containerization has been a marked reduction in the demand for longshore labor." *International Container Transport Corporation v. New York Shipping Association*, 426 F.2d 884, 886 (2 Cir. 1970).

obtained the CFSS, directly conflicts with this Court's decisions in *National Woodwork* and *Houston Insulation, supra,* and with the decisions of the Courts of Appeals cited at page 3, *supra.*

2. Historical background.

(a) ILWU is the certified bargaining agent for West Coast longshoremen.

Modern labor relations in the longshore industry on the West Coast began with the agreement between the predecessors of PMA and ILWU to submit the 1934 strike to an arbitration board appointed by President Franklin D. Roosevelt. The award issued by that board became the basis for a labor relations structure that has at all times since then included a registered work force, decasualization of employment and rotary hiring through a jointly operated dispatch hall. In 1938 the National Labor Relations Board, then recently created by the Wagner Act of 1937, gave its approval to these arrangements by certifying the ILWU as the statutory collective bargaining representative of "the workers who do the longshore work in the Pacific Coast ports of the United States . . ." *Shipowners' Association of the Pacific Coast,* 7 NLRB 1002, 1041 (1938).

(b) West Coast longshoremen historically assembled cargo for loading on the docks and disassembled it after discharge on the docks.

Prior to and at the time of the Board's 1938 certification, cargo which was to be loaded aboard vessels was brought to docks in small miscellaneous lots. Such lots of cargo were placed on ropes or net slings by longshoremen and then hoisted aboard the vessel by

longshoremen using the ship's winches. As time went on, cargo handling techniques became more sophisticated, more powerful winches (and, later on, cranes) were utilized and the size of the units handled by the longshoremen grew larger and larger. Individual lots of cargo were prepared for loading, they were put together, unitized, banded, glued, palletized—so that they could be handled more quickly, more efficiently and in a safer manner. The reverse of this operation took place when cargo was unloaded from the ships and the units were broken down—depalletized and unbanded—so that they could be prepared for movement to the individual consignees.

This work of assembling the cargo on the docks and putting it in the form in which it was to be loaded aboard the vessel and of disassembling it when it was unloaded and of moving it across the docks has historically been exclusively performed by the longshoremen.[3] This work included the placing of cargo into, and taking it out of, the various types of boxes that were used before the modern container came into

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[3]In its 1938 certification the Board had held that the term longshoremen "quite frequently includes everyone who works *either* on board ship *or* on the docks" (7 NLRB 1025; emphasis supplied). It specifically included in the bargaining unit "dock men" (*id.* 1033) and "dock workers" (*id.* 1035).

See also the following uncontradicted testimony:

"Q. Now when it was turned [sic: *time*] to load that cargo aboard a vessel, the cargo had to be assembled and placed on a pallet board, or whatever had to be done to load it on the vessel, the longshore employees of PMA did that; took it from the shed and assembled it and did whatever had to be done to put it aboard the vessel?

A. Right.

Q. And conversely when a vessel was unloaded the cargo would come off the vessel either on pallet boards or loose or whatever method they used for unloading; the longshoremen

being. In his Brief to the Court of Appeals (pages 4-5, 9), General Counsel for the Board conceded that this was traditional and historical work of longshoremen.

(c) New cargo handling techniques in the 1940's and early 1950's and their effect upon labor relations.

Throughout the 1940's and 1950's newer and more efficient methods of cargo handling, with larger, newer and more efficient machines and employing larger boxes which ultimately became containers, were introduced on the docks. All of this was vigorously resisted by the longshoremen since every new advance meant a shorter time and less men to do the job.[4] The result was more than a decade of stormy labor relations, job actions and strikes.[5]

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would remove that cargo from the vessel and place it into the shed?

A. Correct.

Q. And if the cargo had to be broken down either from high piles or [in] any other way, that would be broken down at this point; getting the cargo into the shed and breaking it down, was something that longshoremen did?

A. Correct." (Transcript of Proceedings before the National Labor Relations Board herein [Tr.] 578-579).

[4]See, *e.g., International Longshoremen's and Warehousemen's Union (American Mail Line, Ltd.)*, 144 NLRB 1432, 1442 (1963): "There is little question but that it is the work of the individual longshoremen which in the course of time is being adversely affected by the increased use of mechanized equipment."

[5]"The history of maritime labor relations in this country has been punctuated with lengthy major strikes and continuous minor disruptions." *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 296-297 (1968) (Douglas J., concurring.

See also Maritime Labor Board, *Report to the President and the Congress*, H.R. Doc. No. 646, 76th Cong., 3rd Sess., (1940); Schneider, *Industrial Relations in the West Coast Maritime Industry*, Institute of Industrial Relations, University of California (Berkeley, 1958); Kosoris, *Working Rules in West Coast Longshoring*, 84 Monthly Labor Review 1 (1961).

By the late 1950's, both sides—ILWU and PMA—began to understand that some way had to be found out of the impasse which had reduced collective bargaining almost to chaos and which had brought the industry on the West Coast to an untenable competitive position. However, it took some time for the forward-looking leadership on both sides, first, to convince each other of their own good faith, and, second, to convince their followers that a new approach was required.

(d) The Mechanization Agreement of 1960.

By 1960, the parties were able to adopt a "Modernization and Mechanization Agreement". This Agreement, to quote the Board,

> ". . . recognized for the first time that technological advances had seriously diminished the available work for longshoremen and attempted to accommodate the legitimate interests and needs of both parties . . ." (App. vi).[6]

[6]This Court has called this mechanization contract

"a milestone agreement which, it was hoped, would end a long and troubled history of labor discord on the West Coast waterfront" and "an enlightened and forward-looking step in the West Coast Longshore Labor relations." *Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. at 264 and 264, n.1 (1968).

Mr. Justice Harlan said, in concurrence:

"This . . . labor agreement was, according to apparently unanimous industry and expert opinion, a highly desirable step forward in the shipping industry" (*id.* 283).

See also *International Longshoremen's and Warehousemen's Union (American Mail Lines)*, 144 NLRB 1432, 1442 (1963) ("a history making precedent, a peaceful settlement of a problem that has troubled the West Coast waterfront for a number of years."); *International Longshoremen's and Warehousemen's Union (Howard Terminals)*, 147 NLRB 359, 366 (1964) ("a pioneering settlement . . . of manpower and economic problems resulting from the increasing use of mechanized equipment on the waterfront [which] may well serve to promote industrial peace in this area of American industry").

From ILWU's point of view the heart of the agreement was, as described by the Board in the instant case, that

> "In return for the Union's relinquishment of make-work practices, it was . . . agreed . . . that the operation of all new equipment on the docks would be performed by longshoremen . . ." (App. vii).

(e) Subsequent developments: The late 1960's.

During the early 1960's, the mechanization agreement seemed to have solved the problems created by the early changes in technology. However, at that time containerization as it is now practiced in the longshore industry was, unbeknownst to the parties, still in its infancy and, as the Board noted, developments throughout the next decade changed the picture radically:

> ". . . with increasing acceleration, shipping companies began to adopt, some exclusively, the new method of transporting cargo known as 'containerization'. The use of boxes or bundles on or off pallets became a less desirable and uneconomical method of handling cargo in the new technology . . . [S]teamship companies converted their vessels to carry containers or constructed new ships solely for that purpose. Obviously, the larger and more self-contained the load, the less work for longshoremen to load or unload the ship and, as a parallel, the less time in port for the ship, with substantial savings to the shipping industry." (App. vii-viii).

As the Board further noted, "[t]he development of this method of carrying freight *gave rise* to the estab-

lishment of container freight stations" (App. viii; emphasis added). It is at these container freight stations that other persons now perform, away from the docks, the assembling and disassembling of cargo which had previously been done by longshoremen on the docks.[7]

The containerization of the industry continued with rapidity throughout the decade and by 1968 it became a veritable explosion. By 1969, 20% of all cargo handled across West Coast docks was containerized and by 1970 the figure had risen to over 25% (General Counsel's Exhibit 2P before the National Labor Relations Board). The effect of these developments on longshore jobs opportunities was dramatic. Between 1969 and 1970 the total hours worked by West Coast longshoremen had dropped by some 5,000,000 from over 31,000,000 in 1969 to 26,000,000 by 1970 (General Counsel's Exhibit 2Q)—a loss of almost 20%.[8]

The stuffing and unstuffing of containers had become a substitute for the dock work which longshoremen had previously performed. In some instances, such as those which are at the heart of the contro-

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[7]One intervenor, California Cartage Company, Inc. (Cal Cart) had no employees regularly engaged in this work prior to 1965 (Tr. 81, 114-115) and the other, Pacific Motor Trucking Company (PMT) had only two employees who occasionally did this work before 1965 (Tr. 438, 440, 454).

[8]A comparison of the manhours required to load a conventional vessel, for which the cargo has to be assembled on the dock and stowed in the hold, with the manhours required to load a containerized ship, for which the cargo is, in effect, already preassembled and pre-stowed, tells the story: work which required in excess of 10,000 manhours in the former case can be done in approximately 300 manhours in the latter (Tr. 1165-1166, 1182).

versy here, the work was moved away from the docks where it had been performed by longshoremen and transferred to container freight stations operated by non-unit personnel.[9]

(f) Longshore work history involving the container.

In addition to the exclusive history of longshoremen performing piece-by-piece cargo handling on the dock (work for which the container has become a substitute), longshoremen also have traditionally and historically performed stuffing and unstuffing work on various kinds of containers up to and including modern containers. The predecessor of the modern container goes all the way back to 1924 when longshoremen stuffed and unstuffed small wooden crates. (App. vii). Prior to World War II, longshoremen were used regularly to stuff 4 x 6 foot "van packs" for the military. These "van packs" carried household goods and thousands were stuffed in the period before the war. (Tr. 642-643, 678). After World War II there was a gradual development of various kinds of containers. They ranged in size from 4 x 8 to 8 x 8 to 8 x 12. Again to the extent such containers were used, longshoremen performed the work of stuffing and unstuffing them (Tr. 906, 997, 1014, 1097-1098).

The first modern container appeared in 1958 and the first modern container station was opened by PMT in 1959. (Tr. 438). This latter was a small operation involving only two full-time employees. (Tr. 438, 440,

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[9]Prior to 1968, before the move away from the docks began in earnest, *longshoremen stuffed containers for the very shipping lines for whom Cal Cart and PMT now perform this service* (Tr. 116, 438, 853, 865).

454). At the very time that this operation was going on, bargaining unit employees were stuffing and unstuffing containers at the docks under the ILWU-PMA contract. (Tr. 853, 865, 1036, 1102). Cal Cart did not start its container freight station until 1965-1966 (Tr. 81, 114-115). It did not obtain the container work from shipping lines which had been having their modern container work performed by longshoremen at the docks until late in 1968. (Tr. 116).[10] By the time this litigation commenced in 1971, however, both companies together had converted what were small operations in 1965 (approximately 10 full-time employees at a maximum) to operations involving 100 to 135 employees. In his Brief to the Court of Appeals (pages 10-11), General Counsel for the Board conceded that longshoremen did and do perform stuffing of modern containers whenever that was and is done at the docks.

Although during this development longshoremen continued to perform work on the modern container on the dock in fairly substantial amounts, with the increased growth of off-dock stations manned by non-unit personnel and with the veritable explosion in the use of containers in 1968, the loss of work by longshoremen had reached such serious proportions that, when the issue was not initially resolved, the longshoremen went on strike over it. *Pacific Maritime Association v. International Longshoremen's and Ware-*

[10]Beginning in 1968, when Cal Cart and PMT became more involved in the container freight station business, their employees began to stuff the less-than-container-loads which are involved in this case, prior to that time, these employees had stuffed principally shippers' loads, which are not involved in this case.

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housemen's Union, 454 F.2d 262 (9 Cir., 1971). This strike, in the middle of the contract term, was the first strike since industrial peace had been reestablished on the West Coast waterfront in the 1950's (*supra,* p. 11) and was the direct result of the economic pressure being felt by the rank and file longshoreman as a result of the impact of containerization on his job opportunities.

3. The negotiation of the container freight station supplements.

In these circumstances and to meet this threat to the work force, PMA and ILWU, in collective bargaining, negotiated the CFSS.

The Board put it succinctly:

> "As the decade of the 1960's neared its end, the ILWU was concerned at the loss of longshore work to an extent not contemplated in the 1960 Agreement, and therefore sought and obtained from PMA the so-called Container Freight Station Supplements to their collective-bargaining contract. These Supplements were executed on January 5, 1970, and February 10, 1972, and provided, in effect, that all stuffing and unstuffing of containers to be loaded or unloaded from ships docking in Pacific Coast ports, except for shippers' loads and door-to-door deliveries, was work to be performed by ILWU members. The intent of the 1970 Supplement was to bring container work 'to the dock or to areas adjacent to the dock on or before June 30, 1971'." (App. viii-ix).

The 1970 CFSS sought to achieve this objective by providing that the stuffing and unstuffing of containers might be performed by PMA members either under

the terms of the basic longshore contract or, at the option of the employers, by the longshore work force at a "Container Freight Station", which it defined as "a permanent facility on a dock or in a dock area". (General Counsel's Exhibit 2C, Section 1.12). However, it specifically excluded from its coverage shippers' loads and door-to-door shipments (*id.* Sections 1.533, 1.541, 1.542).

The 1972 CFSS spelled out the objective:

> ". . . to *protect and preserve the established work of employees* covered by the PMA/ILWU Pacific Coast Longshoremen's & Clerks' Agreement and this CFS Supplement at *docks or areas adjacent thereto.*" (General Counsel's Exhibit 3, Section 1.5; emphasis supplied).

It provided for a tax of $1.00 per ton[11] on containers not stuffed or unstuffed by unit employees, *except* for shippers' loads, door-to-door loads, loads destined to or from retailers or wholesale warehouses, factories, or processing plants, within a defined "Port Area CFS Zone", and cargo shipped in the coastwise or intercoastal trade (*id.* Section 1.53).

4. The limited scope of the container freight station supplements.

The CFSS was narrowly drawn to meet the precise evil to which it was directed—the loss of work on the docks.

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[11]The tax is to be used as an offset toward the cost of the Pay Guarantee Plan for the employees, with any surplus to be used to reduce unfunded past service Pension liability. (*id.*).

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As the Board noted, the agreement relates to only a "small portion of the work of stuffing and unstuffing containers since shippers' loads, representing 85 percent of that work, are not included." (App. xiii). Such loads (and door-to-door loads) are containers fully stuffed by the manufacturer or consignor generally at a point a considerable distance from the docks and which are loaded directly aboard the vessel and move directly to the consignee or purchaser (Decision of Administrative Law Judge before the National Labor Relations Board [ALJ Decision] 11, n. 10. The CFSS applies to only less than full container loads, that is, to "a container whose contents have more than one consignee and generally more than one owner consignor and *by necessity must be packed or stuffed* (or if inbound unpacked and unstuffed) *at a point very near the port or wharf where the ship will be moored or berthed.*" (*Id.;* emphasis supplied).[12]

It is this collective bargaining effort—narrowly drawn to meet a specific evil—which has been stricken down as violative of Section 8(e).

The 8(b)(4) violation found against the ILWU and its Locals 13 and 63 consisted solely of efforts, directed only toward PMA members who employ unit employees, to enforce the collective bargain. Thus the

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[12]Additional evidence of the care with which the agreements were drawn to reach only dock work and to prevent, so far as possible, against reaching out beyond that area is to be found in the fact that a transition period was provided to have the work "brought to the dock or in areas adjacent to the dock" (General Counsel's Exhibit 2C, Section 1.5) and in the fact that the transition period will be extended to accommodate existing collective bargaining contracts. (*Id.* Section 1.51).

International sent a letter to its locals "to see to it that all containers not stuffed by the registered work force will not be loaded aboard ship . . . unless such loads fall under the exception of manufacturers loads, military cargo, door-to-door . . ." (ALJ Decision 18). The locals' agents strictly limited their efforts to ILWU-represented personnel and to PMA employers. At no time did they approach, or discuss the matter with, any persons other than their own members or their own employers (*id.* 19-20).

It is thus clear that the total thrust of the ILWU's activity, both in negotiating the CFSS and in seeking to enforce it, was directed to its own employers and was not addressed to the labor relations of the intervenors or anyone else.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH NATIONAL WOODWORK MANUFACTURERS ASSOCIATION v. NLRB, 386 U.S. 612 (1967).

(a) National Woodwork held that a collective bargaining contract aimed at preserving traditional bargaining unit work did not violate Section 8(e) of the Labor Management Relations Act, "however severe" might be its effect on third parties. The necessary implication of the decision is that the bargaining unit may seek to perform work which is the technological substitute for its traditional work.

Eight years ago this Court decided the case which has become the standard against which the application of Section 8(e) to work preservation clauses in collective bargaining contracts must be measured. *National Woodwork Manufacturers Association v. NLRB,*

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386 U.S. 612.[13] In that case the labor organization had obtained a contract pursuant to which carpenters were not required to handle wooden doors which had been prefabricated elsewhere (386 U.S. 615-616).[14] Instead the preparatory work was to be done at the job site by unit employees.[15] In upholding the contract against the charge that it violated Section 8(e), the Court elucidated the standards which differentiated situations in which it was lawful from those in which it was unlawful for an employer and a labor organization to agree that particular work must be assigned to employees represented by the labor organization rather than to other employees.

In essence, the Court held that, despite its literal language, Section 8(e) does not prohibit an agreement which seeks to preserve work traditionally and historically performed by members of the bargaining unit (386 U.S. 635) and which is not "calculated to satisfy union objectives elsewhere" (*id.* 644). In addition, the Court held that "however severe" might be

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[13]On the same day, the Court decided *Houston Insulation Contractors' Association v. NLRB*, 386 U.S. 664 (1967) which amplified the principles expressed in *National Woodwork*.

[14]In *Houston Insulation*, the employers had agreed not to contract out work relating to the preparation of pipe and boiler coverings (386 U.S. 665-666). The effect of both these agreements was to require the work to be done by what obviously were technologically less advanced and more costly methods. Contrary to the effect of those agreements, the CFSS permits, rather than inhibits, technological change. It does not prohibit the use of new equipment. All it requires is that the members of the bargaining unit, rather than others, shall work on such equipment.

[15]This is the very essence of the CFSS: Not to have the preparatory work of stuffing containers before they are loaded aboard ship done elsewhere but rather to have it done by the longshoremen at their dock-side job site.

the effect of such a contract upon the other persons, that factor did not transform an otherwise lawful primary agreement into an unlawful secondary one. (386 U.S. 627). All such agreements (whether valid or invalid) will have some such effect.[16]

While the facts of the case involved the preservation of jobs done in the traditional manner, the necessary implication of the decision is that bargaining unit employees may also seek to perform work which, by virtue of improved technology, takes the place of that which they had traditionally performed. The Court noted that the problem of technological unemployment was of great and continuing concern to the Nation and the Congress and stated that it could not impute to Congress an intent, in enacting Section 8(e), to preclude collective bargaining agreements aimed at easing "this most vital problem created by advanced technology." (*id.* 640-642).[17]

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[16]Even before *National Woodwork*, the Court had rejected the "effect upon others" test as a standard by which to judge the legality *vel non* of labor activity. *Local 761, International Union of Electrical, Radio and Machine Workers v. NLRB*, 366 U.S. 592 (1961). Subsequently, the courts of appeals (including, until the instant case, the court below) have consistently so held. *Local No. 742, United Brotherhood of Carpenters and Joiners v. NLRB*, 444 F.2d 895, 901 (D.C. Cir. 1971), *cert. den.* 404 U.S. 986, (1971); *American Boiler Manufacturers Association v. NLRB*, 404 F.2d 547, 552 (8 Cir. 1968), *cert. den.* 398 U.S. 960 (1970); *NLRB v. Local Union No. 164, International Brotherhood of Electrical Workers*, 388 F.2d 105, 107 (3 Cir. 1968); *NLRB v. Local Union No. 28, Sheet Metal Workers International Association*, 380 F.2d 827, 830 (2 Cir. 1967). The Board also has heretofore so held. *Highway Truck Drivers and Helpers etc., Local* 107, 159 NLRB 84, 99 (1966).

[17]The Court turned aside an argument that to allow work preservation clauses under Section 8(e) would impede technological and economic progress, stating that such a contention should be addressed to the Congress (386 U.S. 644). Since that decision Congress

In determining whether an agreement is a lawful work preservation agreement, consideration is to be given to the "remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted and the economic personality of the industry." (386 U.S. 644, n. 38).[18]

(b) The decision below conflicts with National Woodwork since it invalidated a collective bargaining contract because it allegedly affected or might affect third parties and also because the decision did not consider that the work involved was the technological substitute for the work historically performed.

(i) The decision below impermissibly considered the alleged effect of the contract upon others.

One of the main premises underlying the decision below was the Board's obvious concern that the CFSS might have an adverse effect upon other persons. The Board explicitly stated that since PMA and ILWU had early on been able to agree to a solution that eliminated restrictive work practices, they ought to be able to reach a similar agreement now without "affecting the rights of other employers and their employees" (App. xii).

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has not modified this Court's view that under Section 8(e) an agreement to preserve traditional work is lawful even if it means adherence to outmoded and inefficient work practices. Clearly then Section 8(e) should not invalidate a contract which accommodates to technological change.

[18]The Board's factual findings establish that, applying these criteria to this case, the CFSS is a primary, not a secondary, agreement; that it is concerned with a direct threat of job replacement; and that it concerns ILWU's relations with PMA and has no objectives elsewhere.

But the application of such a standard, "however severe" the impact on others may be, is directly contrary to the holding of *National Woodwork* (and to the holdings of the Courts of Appeals for at least three other circuits [*supra*, n. 16]).

The Board attempted to distinguish this square holding of *National Woodwork* by saying that a boycott to enforce a claim to stuff shippers loads (although it recognized that such loads are explicitly excluded from the CFSS) "would have an enormous impact upon the shipping industry" (App. xiii). There are two reasons why we need not enter into a semantic argument which seeks to distinguish this Court's "however severe" test from the Board's "enormous impact" test. The first is that the Board had no business under this Court's decision (and the decisions of the courts of appeals) to apply any such test at all. Thus, since the Board has applied a patently improper legal standard to the record here, its Order cannot stand. The second is that while the concept of a shipper's load has existed since at least before World War II (Tr. 672), no claims have been made by longshoreement to this work and the CFSS is carefully drawn to exclude any such claims.

The fact that no such claims have been made here leads, we submit, only to one conclusion: that the CFSS is truly a work preservation clause. The Court of Appeals for the Second Circuit has so treated a similarly limited agreement in another industry:

> ". . . the careful specification of the type of prefabricated products that were not to be used would

> tend to support the view that the clause was a work-preservation clause" (*NLRB v. Local No. 28 Sheet Metal Workers International Association, supra,* 380 F.2d at 830).[19]

In essence, the Board's position is that, since a claim for more *might be* unlawful, a claim for less *is* also unlawful. This makes no sense either logically or practically. Mr. Justice Holmes condemned such reasoning nearly 50 years ago when he observed, in another context, that "the power to tax is not the power to destroy *while this court sits.*" (*Panhandle Oil Co. v. State of Mississippi,* 277 U.S. 217, 223 [1928]; emphasis supplied). If the day should ever come that the ILWU asserts a broader claim to container stuffing work than is presently the case, the Board and the courts will be able to deal appropriately with it. In the absence of such a claim here it was improper for the Board to have made the legality of the present agreement turn on hypothetical speculation.

From a common sense viewpoint, the lack of a claim for shipper's load work ought to be viewed as a factor favoring the legality of the CFSS. Indeed, the Board, in *United Brotherhood of Carpenters and Joiners of America, Local 112,* 200 NLRB 205 (1972), stressed the evidence of the carpenter's willingness to permit the use of some modular home building techniques as establishing a good faith work preservation objective.

In sum, the agreement's effect on others is not a valid adverse criterion under *National Woodwork;*

[19]Just so, the CFSS carefully specifies that it covers only less than container loads. It imposes no restrictions on the stuffing of shippers loads.

certainly the petitioners' attempt to limit the scope of their agreement's effect on others ought to be viewed as a positive factor in favor of its legality. If not, the Board's reasoning will have created a labor relations version of *Catch 22* in which preserving less becomes the same as acquiring more.

(ii) The decision below failed to consider that the work covered by the contract was a technological substitute for traditional unit work.

A second equally significant conflict of the decision below with *National Woodwork* lies in its failure to consider petitioners' contention that, under Section 8(e) and the rationale of *National Woodwork* an agreement to assign the technological successor of what has been traditional work is also valid work preservation.

As we have previously noted, the necessary implication of the decision in *National Woodwork* is that the bargaining unit may seek to perform such successor work.[20] The Board never once addressed this issue, but its decision when read in the light of the facts of this case means that a union may *not* seek to perform such work.

In this case the petitioners have not attempted to preserve the old system at the expense of progress.

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[20]In *Local No. 433, United Brotherhood of Carpenters and Joiners v. NLRB*, 509 F.2d 447 (D.C. Cir. 1974) the court below had correctly held that the issue of whether the new materials used on the job were "substituting materials" for those previously used by the unit employees was "crucial" in determining whether the installation of those materials was "clearly claimable unit work." (509 F.2d 452, n. 30).

Unlike the carpenters in *National Woodwork* who prohibited the use of precut doors, PMA and ILWU have agreed that the new work method is permissible but have merely specified that if the new method is to be used it should be performed by longshoremen on the docks.

Had petitioners followed the same path as the unions and the employers followed in *National Woodwork* and in the subsequent construction cases in which prefabricated products were flatly prohibited, they would undoubtedly not now be before this Court. For such a case would have had to be viewed by the Board as a traditional 8(e) case in which a union whose members had always done the piece-by-piece handling of cargo on the docks was entitled, just as the carpenters in *National Woodwork* were entitled, to ban the introduction of any methods which displaced that work. Instead, however, PMA and the ILWU have been penalized for taking the more sensible and beneficial approach of working together to upgrade the industry and, in the process, of attempting to preserve to the longshoremen the new work which thereby became the substitute for their traditional work. This innovation may be enough to distinguish *National Woodwork* as a factual matter, but certainly not as a matter of the case's underlying policy. Indeed, the decision below has created a dangerous incentive for unions to insist upon the old ways of work and it is therefore appropriate for the Court to declare that its *National Woodwork* decision shall not be so distorted.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

(a) The courts of appeals have consistently held that Section 8(e) does not outlaw efforts to recapture work which has eroded from the bargaining unit or work which, because it is closely allied to traditional work, is fairly claimable by the bargaining unit.

Both before and since *National Woodwork* the courts of appeals have employed various analytical techniques in an effort to distinguish valid work preservation from invalid work acquisition agreements. These include what is known as the "work recapture" doctrine and also a mode of analysis in which the work in question is analyzed in terms of whether it is "fairly claimable". Petitioners submit that both are applicable here and, that, when applied to the facts found by the Board in this case, they sustain the legality of the CFSS.

(i) Under the "work recapture doctrine", an objective of re-acquiring work that has eroded from the bargaining unit is a primary and lawful objective.

In *American Boiler Manufacturers Association v. NLRB,* 404 F.2d 547 (8 Cir. 1968), *cert. den.,* 398 U.S. 960 (1970), the court of appeals explicitly rejected the contention that *National Woodwork* intended the term "traditional work" to encompass only "that work which is currently, continuously and exclusively performed by unit employees". (404 F.2d 551). The court noted that in *National Woodwork* one-third of the doors being shipped into the area at the time the charges were filed were already precut and that the use of blank doors may have been the

exception rather than the rule (*id.* 551 and 551, n. 7). Since, despite these facts, this Court had upheld the clauses involved, the court of appeals concluded that the term "traditional work" was not so limited.

While expressing no opinion as to whether such a clause is lawful if the objective is to acquire work which had "been completely lost" before the clause was negotiated, the court specifically held that

> "the term 'traditional work' includes work which unit employees have performed and are still performing at the time they negotiated a work-preservation clause." (*id.* 552).[21]

Applying these principles to the case before it, the court concluded that a clause in a 1963 contract requiring piping on boilers to be fabricated on the jobsite or in the shop of the plumbing contractor did not violate Section 8(e). Prior to the 1940's the union had done all such work on the jobsite, but by the time of the 1963 agreement 60 to 85 percent of the boilers installed in the area already had prefabricated piping. Despite this almost complete erosion of the work, the Eighth Circuit found the clause lawfully preserved traditional work.

The decision below is in clear conflict with, although it never mentions, this holding in *American Boiler*.

Similarly, the District of Columbia Court of Appeals had, prior to *National Woodwork*, recognized the legitimacy of a work recapture objective. *Meat*

[21]It is clear from the Board's findings here that, at the very least, the longshoremen had not "completely lost" the work of stuffing and unstuffing containers and that they were still performing it at the time the first CFSS was negotiated in January of 1970.

and Highway Drivers, etc., Local 710 v. NLRB, 335 F.2d 709 (D.C. Cir. 1964). There, the delivery of meat from packing houses in the Chicago area to local customers had been the work of local drivers. Subsequently "extensive changes in the distribution of meat products were effected as the major packers moved . . . their . . . operations outside of Chicago". While the local drivers continued to make deliveries from the remaining local packing houses, deliveries were increasingly being made by over-the-road drivers whose runs originated outside the Chicago area.

> "It was to the *problem of recovering the jobs lost* by the local drivers in the Chicago area and retaining those still performed there that the Union addressed itself in the 1961 negotiations". (335 F.2d 712; emphasis supplied).

The union obtained an agreement providing that all deliveries within the Chicago area must be made from a Chicago (i.e.—not an out-of-state) facility (*id.* 711 n. 3).[22] The Board held the clause violated Section 8(e) because the delivery of out-of-state shipments had not been performed by unit employees: all the latter had ever done was to handle local deliveries (*id.* 713).[23]

The court of appeals reversed the Board because the purpose of the agreement was to preserve jobs ("delivery in the Chicago area irrespective of the origin

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[22]Just so, the CFSS provides that less than container loads shall be stuffed at or near the docks, not at facilities away from the docks.

[23]This rationale of the Board, which in any case was reversed by the Court of Appeals, *infra*, is not applicable here for there is no question that longshoremen have in fact stuffed and unstuffed modern containers. (*supra*, pp. 14-16)

of shipment") which were "fairly claimable" by the bargaining unit (*id.* 713-714).

> ". . . in the case before us, we have not work acquisition but work recapture. It is true . . . that in the past out-of-state shipments have on occasion been delivered to consignees in the Chicago area by the interstate carrier directly . . . But when the expiring agreement was originally entered into, practically all of the packing houses from which deliveries to the Chicago area were made were located in Chicago. Consequently, the union had no concern with the occasional shipment into the area via interstate carrier.
>
> "During the period of the expiring agreement, however, there was a dramatic change in the manner in which the employers here conduct their business. Most of the packing houses have been moved out of Chicago, so that now most of the shipments for the area are out-of-state shipments. It is understandable, therefore, that the union, in bargaining for a new agreement, turned its attention to these out-of-state shipments in an effort to require that the last leg thereof be made by local drivers. Thus the union, under its new proposal, is attempting not only to retain jobs for local drivers, but to recapture some of the work lost by the movement of packing houses out of Chicago. Unquestionably, this work is fairly claimable by the local drivers, and their union's efforts in their behalf in that direction fall easily within the legitimate area of collective bargaining." (*id.* 714).[24]

[24]The analogy, on the facts, between the instant case and *Meat and Highway Drivers* is literally overwhelming. With respect to the Board and the court below, may one ask how can the analysis we have quoted in the text apply to truck drivers in Chicago and not to longshoremen on the West Coast? The conflict in the decisions is obvious.

(ii) Under the "fairly claimable work doctrine", an objective of performing work which is closely allied to traditional work is a primary and lawful objective.

The Board's opinion also conflicts with those circuit opinions which establish that a work preservation objective can be present where the work in issue is "fairly claimable." In *Canada Dry Corporation v. NLRB,* 421 F.2d 907 (6th Cir. 1970), the Sixth Circuit upheld an agreement assigning certain work to the retail clerks' union even though the particular work in question, shelving certain brand name products, had never been performed by bargaining unit members.

> "Although the tasks of initially handling and shelving the particular brand name products in issue had not been traditionally performed by the store clerks, we do not regard the clerks' claim to these jobs as representing in any realistic sense an attempt to monopolize jobs or acquire new job tasks. Rather, these were the type of jobs which the clerks had traditionally done and for which they had the skills and experience. We agree . . . that it is unrealistic to define the area of the clerks' legitimate job protection efforts according to brand name or supplier.
>
> "Moreover, the record is devoid of any evidence of a secondary objective. There is no evidence that the union had any dispute with any of the bottlers or other suppliers; or that it was attempting to require the employees of the outside vendors to join the clerks' union; or that the union would allow the suppliers to shelve their own products provided they were represented by a union approved by the clerks." (421 F.2d 909-910).

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Analyzing the work in dispute in terms of whether it was fairly claimable has also heretofore been the methodology of the court below. Thus in *Meat and Highway Drivers etc., Local 710 v. NLRB,* 335 F.2d 709 (D.C. Cir. 1964) it found that interstate delivery was so "closely allied—and in part identical" to the bargaining unit's historical work as to be fairly claimable. And in *Local 433, United Brotherhood of Carpenters and Joiners v. NLRB,* 509 F.2d 447 (D.C. Cir., 1974), the court below reversed the Board because it had "avoided the crucial issue whether haydite blocks were a *substituting* material [for other materials used in traditional carpenter work] *and thus constituted clearly claimable unit work.*" 509 F.2d 452, n. 30; emphasis added). See also *Sheet Metal Workers International Association, Local 223 v. NLRB,* 498 F.2d 687 (D.C. Cir., 1974).

(b) The decision below fails to consider either the "work recapture" or the "fairly claimable" doctrine; the effect of the decision, however, is to repudiate both.

Petitioners recognize that the decision below can be scrutinized with microscopic care without finding anything in it which would appear to reject the applicability of these doctrines to this case. Indeed, the decision below contains no reference to them whatsoever. This failure to consider these doctrines is not only frustrating since it forecloses an examination into their applicability here, but also it makes petitioning for certiorari much more difficult. While the conflict with existing law is not as readily apparent as it would have been had these issues been addressed, it is

real and it is substantial. The conflict cannot be avoided by the failure to address the work recapture and fairly claimable work issues.

(i) Work recapture.

Since it was found by the Board that the use of the container had led to a decrease in work opportunities for longshoremen and that it was the ILWU's legitimate concern with this fact which led it to seek and obtain the CFSS, an obvious work recapture issue was presented. The failure to address the issue cannot conceal the conflict between the holding in *American Boiler, supra,* and the result here, in the light of the findings of the Board and in the face of the uncontradicted evidence that longshoremen had done all the work to which the container had succeeded, had stuffed and unstuffed the predecessors of modern containers, had performed a substantial portion of modern container work, and had stuffed containers for the very customers who were replaced by intervenors prior to the time the work transfer occurred. The conflict is plain to see and needs resolution here as problems of technological unemployment continue to plague the American worker.

(ii) Fairly claimable work.

It is difficult to understand why retail clerks who had never shelved certain products on a supermarket shelf but who had generally shelved other products may legitimately claim the former work or why carpenters may claim new construction work they had never done before for the reason that such work be-

came a substitute for their traditional work, and yet longshoremen may not also fairly claim the work of stuffing and unstuffing containers. Such work is clearly "closely allied and in part identical" to the longshoremen's traditional work; it is a substitute for their traditional work; it is work longshoremen have been doing since the beginning of the modern container and which they had been doing on its predecessors. The refusal of the Board to deal with this issue creates a direct conflict between its decision and the holding in *Canada Dry Corporation, supra.*

CONCLUSION

The impact of technological change on American workers and the role collective bargaining can play in dealing with that problem now is and for some time has been one of the most important and controversial issues in labor relations. In *National Woodwork* this Court established a balance that favored collective bargaining as the technique to be employed on behalf of the worker threatened by increased technology and automation.

> "We cannot lightly impute to Congress an intent in §8(e) to preclude labor-management agreements to ease these effects through collective bargaining on the most vital problem created by advanced technology." (386 U.S. 642).

This Court also insisted that, despite the literal language of Section 8(e), collective bargaining agreements which sought to preserve work were not invalid

"however severe" the impact upon others. In the years since this Court struck that balance, a framework of analysis has developed involving such factors as work recapture and the concept of fairly claimable work in order to ascertain when a union and an employer have overstepped the line in their efforts to cope with these problems.

The decision below, however, ignored this Court's holding and departed from the analytical approach that has since developed and received the sanction of the several circuits. Considerations never before employed were interjected and, despite repeated urgings, no comment was even made on petitioners' contentions concerning the recapture of fairly claimable work. While this approach may have made it easier for the Board to reach the result here and while it may have thereby avoided the conceptual and practical difficulties that would have arisen had these issues been directly confronted, the difficulty of resolving a clearly presented issue should not be accepted by this Court as a reason for glossing it over.

Perhaps the Board and the Court of Appeals did not intentionally mean to signal a new approach and a backing away from the balance struck in *National Woodwork* and from prior doctrine, but the effect of the decision below is to do just that. It is thus necessary for this Court to intervene and to re-establish the underlying policy set forth in *National Woodwork*.

Nearly a decade has now passed since that case was decided and this case shows that new guidance is needed in this area. If it is not given in this case, not

only will substantial injustice have been done to these petitioners, but, more importantly, the decision below will stand to encourage unions to refuse in the future to cooperate with employers who wish to introduce new technological methods of performing work.

The petition for certiorari should be granted.

Dated, November 8, 1975.

Respectfully submitted,

KENNETH W. ANDERSON,
KENNETH E. RISTAU, JR.,
Attorneys for Petitioner
Pacific Maritime Association.

NORMAN LEONARD,
Attorney for Petitioners International Longshoremen's and Warehousemen's Union and Locals 13, 63, 10 and 34.

GIBSON, DUNN & CRUTCHER,
GLADSTEIN, LEONARD,
PATSEY AND ANDERSEN,
Of Counsel.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1974

Pacific Maritime Association, Petitioner, vs. National Labor Relations Board, Respondent, California Cartage Company, Inc., Pacific Motor Trucking Company, Intervenors,	No. 74-1266
International Longshoremen's and Warehousemen's Union; Local 13, et al., Petitioners, vs. National Labor Relations Board, Respondent, Pacific Motor Trucking Company, California Cartage Company, Inc., Intervenors.	No. 74-1296

[Filed June 26, 1975]

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board

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Before: ROBB and WILKEY, Circuit Judges and MERHIGE,* United States District Judge for the Eastern District of Virginia

JUDGMENT

These causes came on to be heard on petitions for review and cross applications for enforcement of an order of the National Labor Relations Board and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

Ordered and Adjudged by this Court that for the reasons stated in the decision and order of the National Labor Relations Board, 208 N.L.R.B. No. 130 (Feb. 11, 1974) the court is of the opinion that the findings and order of the Board are supported by substantial evidence on the record as a whole and that the petitions for review must be denied and the order of the Board enforced.

Per Curiam

For the Court

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

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*Sitting by designation pursuant to 28 U.S.C. § 292(d)

Appendix B

208 NLRB No. 130

United States of America
Before the National Labor Relations Board

International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union, (California Cartage Company, Inc.),	
and	Case 21—CC—1326
Robert A. Curry,	
International Longshoremen's and Warehousemen's Union; Local 13, International Longshoremen's and Warehousemen's Union; and Local 63, International Longshoremen's and Warehousemen's Union, Respondent Unions,	
and	
Pacific Maritime Association, Respondent Employer,	
and	Cases 21—CE—103 21—CE—112
California Cartage Company, Inc.,	
and	
Pacific Motor Trucking Company, Charging Parties,	

International Longshoremen's and Warehousemen's Union; Local 10, International Longshoremen's and Warehousemen's Union; and Local 34, International Longshoremen's and Warehousemen's Union, Respondent Unions, and Pacific Maritime Association, Respondent Employer, and	Cases 21—CE—109 21—CE—111
International Cargo Services, Inc., and Richmond Export Services, Inc., Charging Parties,	Case 21—CE—116

DECISION AND ORDER

On October 19, 1972, Administrative Law Judge James T. Rasbury issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent Pacific Maritime Association,[1] the International Longshoremen's and Warehousemen's Union[2] and its Locals, and Charging Parties California Cartage Company, Inc., and Pacific Motor Trucking Company,[3] filed exceptions and supporting briefs. The General Counsel, Respondents PMA and ILWU, and Charging Parties PMT and California Cartage Company, Inc., also filed answering briefs. Charging

[1]Hereafter referred to as PMA.
[2]Hereafter referred to as ILWU.
[3]Hereafter referred to as PMT.

Party PMT filed a motion to strike the two briefs filed by Respondent which pertain to other cases beyond the records herein, and Respondent ILWU filed a motion for oral argument.

On September 13, 1973, oral argument was heard before the Board[4] in the instant cases and in Cases 21—CD—298, 21—CD—308, and 21—CD—314, in which the General Counsel, Charging Parties California Cartage Company, Inc., and PMT, and Respondents PMA and ILWU participated. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 692, also participated.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and oral argument and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as herein modified.[5]

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[4]Without objection from any of the parties Board Member Howard Jenkins, Jr., then nominated for reappointment, but not yet confirmed by the Senate, was invited to sit with the Board during oral argument.

[5]Finding merit in certain of the General Counsel's exceptions, we hereby correct the following errors in the Administrative Law Judge's Decision:

(1) The Administrative Law Judge stated that the container stuffing done by California Cartage consisted of less than container loads. The record discloses, however, that a great amount of the stuffing done by this firm consists of "straight" loads, which are large lots of cargo on a single bill of lading which completely fill one or more containers.

(2) The Administrative Law Judge apparently inadvertently held that if the agreement involved herein was tactically calculated to satisfy objectives elsewhere, the Charging Parties are neutral bystanders; i.e., the secondary employers. In fact,

The facts in these consolidated cases are not in dispute, Respondent PMA and Respondent Unions have a long history of collective bargaining covering longshoremen and marine clerks. Since 1961 these employees have been represented under the ILWU-PMA Pacific Coast Longshore and Clerk's Agreement or Document (PCLCA or PCLCD). In 1960, the parties negotiated and adopted a Modernization and Mechanization Agreement. This Agreement recognized for the first time that technological advances had seriously diminished available work for longshoremen and attempted to accommodate the legitimate interests and needs of both parties in the Pacific coast shipping industry. Under the Agreement PMA members gained the right to use new equipment to increase productivity and improve methods for handling cargo. In the future, nonlongshoremen delivering merchandise to the dock would not be required to place the cargo on the "skin of the dock" to be reloaded by longshoremen on other pallets for loading aboard ship. It was agreed that the Union would divest itself of this type of work and longshoremen would load truckers' pallets with the merchandise directly on the ship. Cargo could be unitized in one way or another—boxed, crated, banded, glued, or palletized in large or small containers. The idea was to move the cargo in the safest and most efficient

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he should have stated that under those circumstances PMA and its member companies would be the neutral bystanders.

(3) Further corrections have been made to the Conclusions of Law, the Order, and the Appendixes to reflect errors pointed out by certain exceptions of the General Counsel, including the deletion of Locals 10 and 34 of the ILWU from findings or orders concerning the 8(b)(4) violations.

manner on or off the ship. To accomplish this objective new and improved winches and cranes became standard equipment. Moreover, at this time the process of containerization, the method whereby bulk cargo is placed in large containers, 8 by 8 by 20 or 40 feet or larger, was in its infancy and growing. Matson Navigation Company, a member of PMA had already converted one of its freighters[6] in 1959 to carry a deckload of containers in addition to conventional cargo in its hold. While the record shows that longshoremen exclusively have always performed the actual work of loading and unloading merchandise, however contained, on and off ships, it is also clear that preparing cargo for shipment in various types of containers is work that had been performed over the years by teamsters and other employees as well as longshoremen.

In return for the Union's relinquishment of make-work practices, it was further agreed in the 1960 Agreement that the operation of all new equipment on the docks would be performed by longshoremen and, in addition, members of PMA would establish a mechanization fund of $29 million, subsequently augmented by another $34.5 million, to be used in support of longshoremen's pension, retirement, and unemployment.

During the early part of the 1960's, this compromise apparently worked to the satisfaction of the ILWU and PMA. At the same time, however, and with increasing acceleration, shipping companies

[6]Referred to in the record as *Hawaiian Citizen* or *Hawaiian Merchant.*

began to adopt, some exclusively, the new method of transporting cargo known as "containerization." The use of boxes or bundles on or off pallets became a less desirable and uneconomical method of handling cargo in the new technology. Following the lead of Matson, other steamship companies converted their vessels to carry containers or constructed new ships solely for that purpose. Obviously, the larger and more self-contained the load, the less work for longshoremen to load or unload the ship and, as a parallel, the less time in port for the ship, with substantial savings to the shipping industry.

As indicated above, the modern container is a large enclosure 20 feet or more in length designed to fit into the slot of a containerized ship, or on the chassis of a truck, or piggyback on a train. The development of this method of carrying freight gave rise to the establishment of container freight stations. From the beginning shipping companies, members of PMA and owners of the containers, have contracted with trucking firms to stuff and unstuff some of these containers with merchandise from shippers or to consignees. These trucking firms, such as California Cartage and Pacific Motor Trucking, the Charging Parties in several of these cases, employ drivers and warehousemen represented by the Teamsters.

As the decade of the 1960's neared its end, the ILWU was concerned at the loss of longshore work to an extent not contemplated in the 1960 Agreement, and therefore sought and obtained from PMA the so-called Container Freight Station Supplements to

their collective-bargaining contract. These Supplements were executed on January 5, 1970, and February 10, 1972, and provided, in effect, that all stuffing and unstuffing of containers to be loaded or unloaded from ships docking in Pacific coast ports, except for shippers' loads and door-to-door deliveries, was work to be performed by ILWU members. The intent of the 1970 Supplement was to bring container work "to the dock or to areas adjacent to the dock on or before June 30, 1971." This would require shipping companies to cease subcontracting container stuffing work to employers who did not employ ILWU members and to establish, if necessary, their own container freight stations on or adjacent to the docks within the work jurisdiction of the ILWU.

At issue in these cases is, first, the legality under Section 8(e) of the above contractual provisions and, second, the legality under Sections 8(b)(4)(i) and (ii)(B) of conduct by Respondent International and its Locals 13 and 63 in taking action to implement these provisions, as set forth in detail in the Administrative Law Judge's Decision.

The Board has considered Respondents' defense that the work of stuffing and unstuffing modern containers is work that falls into the category of unit work traditionally performed by members of ILWU within the multiemployer PMA unit and that their attempt to preserve or reclaim this work for ILWU-represented employees is primary, lawful activity under the Supreme Court's decision in *National Woodwork Manufacturers v. N.L.R.B.*[7] Although the

[7] 386 U.S. 612 (1967).

loss of work on the docks, whether due to the use of large containers or other technological improvements, is certainly a matter of legitimate concern to the ILWU, we cannot agree with its legal position in these cases.

Initially, it is clear from the language of the Supplements that the ILWU's claim to container stuffing work is not limited to work generated by members of PMA, but extends broadly to all containers entering of leaving Pacific coast docks, whether or not the owners of the containers are members of PMA and statutory employers of employees within the longshore unit represented by ILWU. Obviously, as to those shipping companies, nonmembers of PMA using the Pacific coast docks to load or unload their containers, the statute does not permit a restrictive contract or a refusal to handle their containers to put pressure on them to cease doing business with trucking, cartage, or other companies which do not employ ILWU members.

With respect to Respondents' reliance upon *National Woodwork, supra,* that rule cannot be applied so broadly as to encompass all efforts by unions to enlarge the work opportunities for members of a bargaining unit adversely affected by technological advances. In that case the Court set forth its views in three opinions, of which Justice Harlan's concurring opinion established a majority of five to four. The main opinion cautioned that the test in determining the legality of a restrictive clause was not "simple"

and must be made with full concern for "all the surrounding circumstances." Such circumstances were defined by the Court as including "the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry.[8] Justice Harlan was careful to note that the case before him did not involve a restrictive contract or boycott to acquire for union members "work that had not previously been theirs."[9] Rather, it was a question of union carpenters seeking to continue their traditional practice of mortising, routing, and beveling blank doors on the jobsite before installation. In the context of these narrow facts, he held that Congress had not forbidden this method of meeting the economic problem arising from a changing technology. Four Justices, dissenting, held that the union's boycott of the prefitted doors fell clearly within "the express terms of the federal labor law."[10]

In *Fibreboard Paper Products Corp. v. N.L.R.B.*,[11] upon which Respondents further rely, the Court restricted its holding of a violation of Section 8(a)(5) in a question involving subcontracting to the facts of that case; i.e., "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same under similar conditions of employment."[12]

[8] 386 U.S. at 644, fn. 38.
[9] *Id.* at 648.
[10] *Id.* at 650.
[11] 379 U.S. 203 (1964).
[12] *Id.* at 215.

In the instant case the record shows that the stuffing and unstuffing of containers, whether large or small, modern or pre-World War II, is work that has been performed both by longshoremen and by other employees, including teamsters employed by the Charging Parties. It may well be, as the ILWU contends, that the modern container is, in effect, part of a ship. But it is also true that the same container is part of a truck or perhaps a train. The traditional work of the ILWU has been to load and unload ships. To a large extent, the make-work rights claimed by longshoremen with respect to cargo placed on the dock were effectively bargained away in 1960. The contract made between the concerned employers and the ILWU in that year is of historic significance because it represented a new approach to the serious problem of employee displacement as a result of technological changes. In good-faith collective bargaining the parties recognized each other's vital interests in a bargain which accommodated themselves and the public. Instead of insisting that technological changes must be restricted, the Union agreed to progress which was, in any event, inevitable. The Companies, on the other hand, assumed responsibility for the economic consequences to union members in the loss of employment. If, indeed, as Respondents insist, longshore work has fallen to an unacceptable level, the way should be clear to the parties to resolve their differences without renewing old wars and illegally affecting the rights of other employers and their employees.

Respondents call to the Board's attention the fact that their Container Freight Station Supplements relate to only a small portion of the work of stuffing and unstuffing containers since shippers' loads, representing 85 percent of that work, are not included. The work of stuffing containers, however, does not change its essential character because it is performed by shippers rather than trucking company employees. Indeed, the evidence indicates that a substantial portion of the work of California Cartage employees involves the stuffing of straight or full loads into containers as well as less than container loads. While the ILWU does not now seek all container work, the logic of its position is that it is legally entitled to all such work without regard to the identity of the competing employees. Obviously, a boycott to enforce a claim to stuff shippers' loads and door-to-door deliveries would have an enormous impact on the shipping industry. This circumstance, among others set forth above, clearly distinguishes this case from *National Woodwork, supra,* it is, moreover, a circumstance which, in accordance with the Court's caveat in that case, warrants the Board's full concern in determining the validity of the ILWU's claim of work preservation.

In reaching our decision in this case we find it unnecessary to pass upon or adopt the Administrative Law Judge's opinion that both secondary and primary employers may coexist in the same multiemployer bargaining unit. We reject the General Counsel's argument that members of PMA who do not directly

employ longshoremen are neutral, secondary employers entitled to the protection of Section 8(b)(4) of the Act.

The ILWU's unit of longshoremen was found appropriate by the Board in 1938.[13] At that time the Board recognized and accepted the fact that not all members of the Waterfront Associations, predecessors of PMA, directly employed longshoremen. Nevertheless, the Board was cognizant then, as it is now, that employers in the shipping industry on the Pacific coast have a direct and vital interest in the terms and conditions of employment for longshoremen. The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship. As the Board pointed out in 1938, the statute defines the term "employer" to include any person acting as an agent for an employer "directly or indirectly." All members of PMA have given that agency the authority to act as their agent and PMA, in turn, is clearly the agent of employers employing longshoremen. In this particular industry the community of interest of the participating employers is unmistakable. We need not, however, and do not go beyond the facts of this case and this industry in holding that all members of PMA are, with respect to the ILWU, primary employers for the purposes of collective bargaining in the established unit of longshoremen and marine clerks.

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[13] *Shipowners' Association of The Pacific Coast*, 7 NLRB 1002 (1938).

On the basis of the foregoing, we find that by entering into the 1970 and 1972 Container Freight Station Supplements, Respondent PMA and Respondent Unions violated Section 8(e) of the Act.

Further, by their inducement and encouragement to the employees of PMA not to handle containers stuffed by non-ILWU labor, and their refusal to handle cargo in an attempt to implement the Container Freight Station Supplement, Respondents ILWU and its Locals 13 and 63 violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Amended Conclusions of Law

Substitute the following for the Administrative Law Judge's Conclusion of Law 4:

"4. By inducing and encouraging individuals employed by PMA and its member companies to engage in work stoppages or refusals to perform services in the course of their employment, and by threatening, coercing, and restraining PMA and its member companies with an object of forcing or requiring them to cease doing business with California Cartage, Respondent ILWU and its Locals 13 and 63 have engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act."

The Remedy

Having found Respondent Unions and Respondent PMA to have engaged in certain unfair labor practices in violation of Section 8(e), and Respondents ILWU and its Locals 13 and 63 to have engaged in

unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, we shall order that each Respondent cease and desist from the proscribed conduct and take certain affirmative action which we find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. Respondent Unions, International Longshoremen's and Warehousemen's Union and Locals 13 and 63 of the International Longshoremen's and Warehousemen's Union, their officers, agents, and representatives, shall:

(a) Cease and desist from:

(1) Entering into, maintaining, giving effect to, or attempting to implement in any way the Container Freight Station Supplements to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between the PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein, or any other contract or agreement, express or implied, whereby PMA, on behalf of its member companies, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(2) Threatening, coercing, or restraining PMA or any of its member companies, or any other person engaged in commerce or in an industry affecting com-

merce, where an object thereof is to force or require such persons to cease doing business with California Cartage, or any other person.

(3) Inducing and encouraging any individual employed by PMA or its member companies to engage in work stoppages or a refusal to perform services in the course of his employment, where an object thereof is to force or require such persons to cease doing business with California Cartage, or any other person.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify member of the International Longshoremen's and Warehousemen's Union that Respondent Unions have no objections to loading or unloading containers that have been stuffed, or are to be unstuffed, by employees of California Cartage, PMT, International Cargo, and Richmond Export, or any other employer utilizing non-ILWU members in the performance of these duties.

(2) Notify all members of the International Longshoremen's and Warehousemen's Union that any previous instructions, requests, or appeals which Respondent Unions may have made against loading or unloading containers not stuffed, or to be unstuffed, by other than ILWU members have been withdrawn and are to have no force or effect.

(3) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplements negotiated by and between PMA and ILWU which limit, restrain, re-

strict, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(4) Post at their business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Appendix A."[14] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by a representative of Respondent International Union, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(5) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

2. Respondent Unions, International Longshoremen's and Warehousemen's Union and Locals 10 and 34, of the International Longshoremen's and Warehousemen's Union, their officers, agents, and representatives, shall:

[14]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(a) Cease and desist from entering into, maintaining, giving effect to, or attempting to implement in any way the Container Freight Station Supplements to the master agreement known as the Pacific Coast Longshore and Clerks' Agreement between PMA and the ILWU to the extent and in the manner said agreement has been found to be unlawful herein, or any other contract or agreement, express or implied, whereby PMA, on behalf of its member companies, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all members of the International Longshoremen's and Warehousemen's Union that any and all of the paragraphs contained in the Container Freight Station Supplements negotiated by and between PMA and ILMU which limit, restrain, restrict, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(2) Post at their business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Appendix B."[15] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by a representative of Re-

[15]See fn. 14.

spondent International Union, shall be posted by Respondents immediately upon receipt thereof, and be maintained by then for 60 consecutive days thereafter, in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(3) Furnish said Regional Director with signed copies of the aforesaid notice for posting by California Cartage Company, Inc., Pacific Motor Trucking Company, International Cargo Services, Inc., and Richmond Export Services, Inc., or such of said employers as may be willing, at all places where notices to their respective employees are customarily posted.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

3. Pacific Maritime Association, San Francisco, California, its officers, agents, successors, and assigns, shall:

(a) Cease and desist from entering into, maintaining, enforcing, or giving effect to any or all of those sections of the Container Freight Station Supplements negotiated by and between PMA and ILWU which restrict, restrain, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members.

(b) Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(1) Notify all company members of the Pacific Maritime Association that any previous instructions, requests, or appeals which Respondent PMA may have made against loading or unloading containers that have been stuffed, or are to be unstuffed, by non-ILWU personnel are to be withdrawn and to have no force or effect.

(2) Notify all company members of Pacific Maritime Association that any and all provisions of the Container Freight Station Supplements which have been negotiated between the PMA and ILWU which restrain, restrict, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by non-ILWU members have been found to be void and unenforceable and are to be stricken from said agreement.

(3) Mail to each of their member companies and post at their main office in San Francisco and at each area office copies of the attached notice marked "Appendix C."[16] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent PMA's representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to member companies are customarily posted. Reasonable steps shall be taken

[16]See fn. 14.

by Respondent PMA to insure that said notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent PMA has taken to comply herewith.

Dated, Washington, D.C.,
February 11, 1974.

Edward B. Miller, Chairman
John H. Fanning, Member
(Seal) Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member
John A. Penello, Member
National Labor Relations Board